

SENATE BILL No. 224

DIGEST OF INTRODUCED BILL

Citations Affected: IC 5-28.

Synopsis: Design-build public works projects. Authorizes a state agency, a state educational institution, a body corporate and politic created by statute, a county, a city, a town, or a township to enter into a design-build contract for the performance of a public works project. Establishes procedures for solicitation and award of a design-build contract. Provides that design-build contracts are subject to the common construction wage.

Effective: July 1, 2004.

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January 8, 2004, read first time and referred to Committee on Governmental Affairs and Interstate Cooperation.

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Second Regular Session 113th General Assembly (2004)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2003 Regular Session of the General Assembly.

SENATE BILL No. 224

A BILL FOR AN ACT to amend the Indiana Code concerning state and local administration.

Be it enacted by the General Assembly of the State of Indiana:

1 SECTION 1. IC 5-28 IS ADDED TO THE INDIANA CODE AS A
2 **NEW** ARTICLE TO READ AS FOLLOWS [EFFECTIVE JULY 1,
3 2004]:

4 **ARTICLE 28. DESIGN-BUILD PUBLIC WORKS PROJECTS**

5 **Chapter 1. General Provisions**

6 **Sec. 1. Notwithstanding IC 4-13.6-5-11, IC 5-16-2-2, and**
7 **IC 36-1-12-16, a design-build contract awarded as provided in this**
8 **chapter is valid and enforceable.**

9 **Sec. 2. (a) Before entering into a design-build contract under**
10 **this article, the governing body of a public agency must adopt a**
11 **resolution authorizing the use of the design-build contracting**
12 **method.**

13 **(b) The resolution adopted by the governing body under**
14 **subsection (a) must identify the members of the technical review**
15 **committee appointed under IC 5-28-4.**

16 **Chapter 2. Definitions**

17 **Sec. 1. The definitions in this chapter apply throughout this**

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1 article.

2 Sec. 2. "Construction services" means services provided under
3 a design-build contract that are not design services.

4 Sec. 3. "Design-build contract" means a contract between a
5 public agency and a design-builder to furnish:

6 (1) architectural, engineering, and related design services as
7 required for a given public project; and

8 (2) labor, materials, and other construction services for the
9 same public project.

10 Sec. 4. "Design-builder" means a person that furnishes the
11 necessary design and construction services under a design-build
12 contract, whether by itself or through contractual arrangements.

13 Sec. 5. "Design criteria developer" means a person registered
14 under IC 25-4 as an architect or IC 25-31 as a professional
15 engineer who is responsible for preparing the design criteria
16 package for a specific design-build project.

17 Sec. 6. "Design criteria package" means a set of documents that
18 provides sufficient information to permit an offeror to prepare a
19 response to a public agency's request for proposals.

20 Sec. 7. "Design services" means those services that are:

21 (1) within the scope of practice specified by IC 25-4 for
22 architecture or IC 25-31 for professional engineering; or

23 (2) performed by a registered architect or professional
24 engineer in connection with the architect's or engineer's
25 professional employment or practice.

26 Sec. 8. "Offeror" means a person who submits a proposal in
27 response to a request for proposals.

28 Sec. 9. "Person" means an individual, a firm, a partnership, a
29 limited liability company, a joint venture, an association, a
30 corporation, or another legal entity.

31 Sec. 10. "Proposal" means an offer by a potential design-builder
32 to enter into a design-build contract for a public project in
33 response to a request for proposals.

34 Sec. 11. (a) "Public agency" means:

35 (1) a state agency (as defined in IC 4-13-1-1);

36 (2) a state educational institution (as defined in
37 IC 20-12-0.5-1);

38 (3) a unit (as defined in IC 36-1-2-23); or

39 (4) a body corporate and politic created by state statute.

40 (b) The term does not include the Indiana department of
41 transportation.

42 Sec. 12. (a) "Public project" means the process of designing,

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constructing, reconstructing, altering, or renovating a public building, an airport facility, or another structure or improvement that is paid for out of:

- (1) a public fund; or
- (2) a special assessment.

(b) The term includes any of the following:

- (1) A process described in subsection (a) relating to a building or structure leased by a public agency under a lease containing an option to purchase.
- (2) A public improvement to real property owned by a public agency.

(c) The term does not include the process of designing, constructing, altering, or repairing a public highway (as defined in IC 9-25-2-4).

Chapter 3. Design-Builder Qualifications

Sec. 1. At the time design services or construction services are to be provided under a design-build contract, a design-builder must:

- (1) be;
- (2) employ persons who are; or
- (3) have as a partner, member, joint venturer, or subcontractor a person who is;

licensed, registered, certified, or otherwise qualified to provide the design services and construction services required to complete the public project and do business in Indiana.

Sec. 2. A design-builder may contract with the public agency to provide design services and construction services that the design-builder is not itself licensed, registered, or otherwise qualified to perform if the design-builder provides the services through subcontracts with licensed, registered, or otherwise qualified persons in accordance with this article.

Sec. 3. This article does not limit or eliminate the responsibility or liability imposed by Indiana law on a person providing design services to the public agency or other third parties.

Chapter 4. Technical Review Committee

Sec. 1. (a) Before entering into a design-build contract, a public agency must appoint a technical review committee of not less than three (3) individuals.

(b) The members of the technical review committee must include the following:

- (1) A representative of the public agency.
- (2) Any of the following:

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(A) An architect registered under IC 25-4.

(B) A landscape architect registered under IC 25-4.

(C) A professional engineer registered under IC 25-31.

(D) A qualified contractor under IC 4-13.6.

(c) A member of the technical review committee who is an architect, a landscape architect, or a professional engineer may be:

(1) an employee of the public agency; or

(2) an outside consultant retained by the public agency for the specific purpose of evaluating proposals submitted under this article.

(d) The design criteria developer may serve as:

(1) a full member; or

(2) a nonvoting adviser;

of the committee.

Sec. 2. (a) A member of the technical review committee may not submit a proposal for or furnish design services or construction services under the design-build contract.

(b) The design-builder may not delegate or subcontract professional services or construction services under the design-build contract to a member of the technical review committee.

Sec. 3. (a) The technical review committee shall do the following:

(1) Qualify potential design-builders as provided in IC 5-28-5.

(2) Rate and score qualitative proposals as provided in IC 5-28-6 and IC 5-28-7.

(b) The technical review committee may interview persons submitting proposals and conduct other business necessary to fulfill the purposes of this article.

Sec. 4. Except for interviews of persons submitting proposals, meetings of the technical review committee shall be open to the public and subject to IC 5-14-1.5.

Chapter 5. Request for Qualifications

Sec. 1. When design-build contracting has been authorized under IC 5-28-1-2(a), a public agency shall publish a notice of a request for qualifications under IC 5-3-1.

Sec. 2. A notice provided under section 1 of this chapter must provide the following information:

(1) An overview of the project and selection process including the following:

(A) A description of the project, including the:

(i) size and function of the facility that is the subject of

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- 1 the project;
 2 (ii) approximate budget; and
 3 (iii) anticipated schedule.
 4 (B) A description of the selection process, including:
 5 (i) the communications between the public agency and
 6 potential design-builders;
 7 (ii) the schedule for the selection process;
 8 (iii) technical review committee procedure; and
 9 (iv) a description of submission requirements.
 10 (2) The general qualifications for prospective offerors,
 11 including:
 12 (A) appropriate experience with similar projects;
 13 (B) team experience with design-build;
 14 (C) organizational resources and depth;
 15 (D) licensing requirements;
 16 (E) financial strength and bonding capacity;
 17 (F) minority business enterprise and women's business
 18 enterprise business history; and
 19 (G) litigation and disputes history.
 20 (3) The project specification qualifications for prospective
 21 offerors, including:
 22 (A) team experience with the facility or building type that
 23 is the subject of the project;
 24 (B) team performance record, including quality, schedule,
 25 and cost of each project;
 26 (C) proposed team composition, including the team's past
 27 experience in working together;
 28 (D) current capacity to manage the project;
 29 (E) proposed key project personnel; and
 30 (F) client references.
 31 (4) A description of the qualifications statement evaluation
 32 process, which must include:
 33 (A) an established rating system that complies with
 34 sections 4 and 5 of this chapter; and
 35 (B) a briefing session or a formal question and answer
 36 process conducted with a potential offeror before
 37 submission of a proposal in response to a request for
 38 proposals.
 39 Sec. 3. (a) A potential design-builder responding to the request
 40 for qualifications under section 2 of this chapter must submit a
 41 verified statement of qualifications setting forth the qualifications
 42 of the potential design-builder and members of the design-builder's

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team if applicable and provide the other information required by the request for qualifications.

(b) The verified statement of qualifications required under this section must include the following:

(1) A listing of all prime contractors and architectural and engineering firms that participate financially as part of the design-builder's team.

(2) A statement that the design-builder or the members of the design-builder's team have completed, or demonstrated the experience, competency, capability, and capacity to complete, projects of similar size, scope, or complexity, and that proposed key personnel have sufficient experience and training to competently manage and complete the design and construction of the project.

(3) A statement that the design-builder or the members of the design-builder's team have the licenses, registrations, and credentials required to design and construct the project, including information on the revocation or suspension of a license, credential, or registration.

(4) A statement that the design-builder has the capacity to obtain all required payment and performance bonding, liability insurance, and errors and omissions insurance.

(5) A statement that the design-builder has an experience modifier rate that is not more than .90 and a United States Occupational Safety and Health Administration recordable rate of not more than 10.0.

(6) A statement that the design-builder or the employees of the design-builder's team performing construction services have completed or are enrolling in an apprenticeship program certified by the Federal Bureau of Apprenticeship Training.

(7) Information regarding any prior serious or willful violation of the Indiana Occupational Safety and Health Act or the Federal Occupational Safety and Health Act of 1970 settled as ordered against the design-builder or a member of the design-builder's team.

(8) Information concerning the debarment, disqualification, or removal of the design-builder or a member of the design-builder's team from a federal, state, or local government public works project.

(9) Information concerning the bankruptcy or receivership of the design-builder or a member of the design-builder's team.

(10) An affirmation that the design-builder or a member of

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the design-builder's team and all contractors and subcontractors providing construction services will comply with the provisions of IC 5-16-7.

Sec. 4. The technical review committee shall rate the potential design-builders responding to the request for qualifications based on the rating system described under section 2(4) of this chapter. The rating system shall include consideration of any of the following:

- (1) The design-builder's experience.
- (2) The design-builder's financial and bonding capacity.
- (3) The design-builder's managerial resources and management plan.
- (4) The design-builder's safety record.
- (5) The design-builder's past performance and capacity to perform.
- (6) The design-builder's ability to complete the work in a timely and satisfactory manner.
- (7) Other selection criteria set forth or verified in the request for qualifications.

Sec. 5. The technical review committee may not consider cost related or price related evaluation factors when rating the potential design-builders.

Sec. 6. (a) The technical review committee shall select at least three (3) and not more than five (5) potential design-builders considered to be the most highly qualified to perform the required services based on the rankings of the potential design-builders. The technical review committee shall report the selection of qualified design-builders to the public agency.

(b) Notwithstanding subsection (a), if only two (2) potential design-builders respond to the request for qualifications, the technical review committee may report the two (2) potential design-builders to the public agency if the technical review committee finds that both potential design-builders are qualified to perform the required services.

(c) If:

- (1) only one (1) potential design-builder responds to the request for qualifications; or
- (2) only one (1) of the potential design-builders responding to the request for qualifications is qualified to perform the required services;

the public agency may not use the design-build contracting method authorized under this chapter, unless the governing body of the

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public agency adopts a resolution expressly authorizing the public agency to send the one (1) potential designer-builder referred to in subdivision (1) or (2) a request for proposal under IC 5-28-6.

Chapter 6. Request for Proposals

Sec. 1. The public agency shall issue a request for proposals to the potential design-builders selected under IC 5-28-5-6. Each request for proposals must contain a design criteria package.

Sec. 2. (a) The design criteria developer shall prepare the design criteria package.

(b) The design criteria developer may not submit a proposal or furnish design or construction services under the contract.

(c) The design-builder may not delegate or subcontract design services or construction services under the design-build contract to the design criteria developer.

Sec. 3. (a) The public agency shall determine the scope and level of detail required for the design criteria package.

(b) The design criteria package must specify the design criteria necessary to describe the public project, which may include, as appropriate, the following:

- (1)** A legal description and survey of the site.
- (2)** Interior space requirements.
- (3)** Special material requirements.
- (4)** Material quality standards.
- (5)** Conceptual design criteria for the project.
- (6)** Special equipment requirements.
- (7)** Cost or budget estimates.
- (8)** Quality assurance and quality control requirements.
- (9)** Site development requirements.
- (10)** Compliance with applicable codes and ordinances.
- (11)** Permits and connections to utilities.
- (12)** Requirements for storm water and roads.
- (13)** Parking requirements.
- (14)** Soil borings and geotechnical information or performance specifications.
- (15)** Life cycle costing and energy consumption requirements.
- (16)** Performance specifications, including warranties.
- (17)** Project schedule.
- (18)** Any other applicable requirements.

Sec. 4. In addition to the design criteria package, a request for proposals must include the following:

- (1)** Instructions.
- (2)** Proposal forms and schedules.

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(3) General and special conditions.

(4) The basis for evaluation of proposals, including a description of the selection criteria with the weight assigned to each criteria.

(5) Any other instructions, documents, or information relevant to the public project that the public agency considers relevant.

Sec. 5. The request for proposals must include the requirement that a proposal be submitted in the following two (2) packages:

(1) A qualitative proposal.

(2) A price proposal.

Chapter 7. Selection and Award

Sec. 1. A proposal submitted in response to a request for proposals described in IC 5-28-6 must satisfy the following:

(1) The qualitative proposal and the price proposal must be submitted simultaneously in separately sealed and identified packages. The price proposal must remain sealed until opened in public under section 5 of this chapter.

(2) A proposal must identify each person with whom the offeror proposes to enter into subcontracts for primary design services and primary construction services under the design-build contract. The public agency may determine requirements under this section.

(3) The price proposal must:

(A) contain one (1) lump sum cost of all design, construction engineering, inspection, and construction costs of the proposed project; and

(B) establish a maximum cost of the design-build contract that will not be exceeded if the proposal is accepted without change.

(4) The qualitative proposal must include all documents, information, and data requested in the request for proposals.

Sec. 2. (a) The public agency shall submit the qualitative proposals to the technical review committee.

(b) The public agency may require clarifications from an offeror to ensure conformance of proposals with the design criteria.

(c) The technical review committee may not consider a proposal until the design criteria developer provides its professional opinion that the proposal conforms with the design criteria.

Sec. 3. (a) The technical review committee shall review the qualitative proposals and establish a score for each qualitative proposal based on the factors, weighting, and process identified in

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the request for proposals.

(b) The technical review committee shall give a written composite score for each qualitative proposal.

Sec. 4. The public agency shall notify all offerors of the date, time, and location of the public opening of the sealed price proposals at least seven (7) days before the opening date.

Sec. 5. The public agency shall publicly open the sealed price proposals and divide each offeror's price by the written composite score that the technical review committee has given to each qualitative proposal to obtain an adjusted price.

Sec. 6. The public agency shall accept the proposal that provides the public agency with the lowest adjusted price. The public agency is not required to accept the lowest price proposal.

Sec. 7. The public agency may reject any and all proposals, except for the purpose of evading the provisions and policies of this article. A public agency must make a rejection of proposals under this section in a written document that states the reasons for rejecting proposals.

Sec. 8. (a) The public agency may negotiate any contract term with the offeror selected under section 6 of this chapter, except for those terms identified in the request for proposals as nonnegotiable.

(b) If the public agency is unable to negotiate a contract with its first selection, the public agency may:

(1) terminate negotiations with that offeror; and

(2) negotiate with the next lowest adjusted price offeror.

A public agency shall continue in accordance with this procedure until a contract agreement is reached or the selection process is terminated.

Sec. 9. (a) Unless and until a proposal is accepted, the drawings, specifications, and other information in the proposal are the property of the offeror.

(b) After a proposal is accepted, ownership of the drawings, specifications, and information in the drawings and specifications shall be determined under Indiana law and the terms of the design-build contract.

Chapter 8. Miscellaneous Provisions

Sec. 1. A design-build contract may be conditional upon subsequent refinements in scope and price and may permit the public agency to make changes in the scope of the project without invalidating the design-build contract.

Sec. 2. (a) A person identified under IC 5-28-7-1(2) as a person

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1 with whom the design-builder proposes to enter into subcontracts
 2 for primary design services and primary construction services
 3 under the design-build contract may not be replaced without the
 4 approval of the public agency.

5 (b) If a design-builder violates subsection (a), the public agency
 6 may cancel the award of a design-build contract.

7 Sec. 3. After award under this article, the maximum cost
 8 established in the successful proposal may be adjusted by
 9 negotiated agreement between the public agency and the
 10 design-builder to reflect modifications in the proposed design-build
 11 project.

12 Sec. 4. (a) The public agency shall require the design-builder to
 13 furnish performance and payment bonds for the project.

14 (b) A performance or payment bond is not required for, and
 15 does not provide coverage for, the part of a design-build contract
 16 that includes design services only.

17 (c) Subsection (b) does not impair the ability of the public
 18 agency to seek recovery under the contract from the design-builder
 19 for errors, omissions, or defects in the design services.

20 Sec. 5. A public agency may not, with respect to a public project
 21 covered by this article, require an offeror to:

22 (1) make application to;

23 (2) furnish financial data to; or

24 (3) obtain any of the surety bonds, or surety bond components
 25 of wrap-up insurance, that are specified in connection with a
 26 design-build contract or specified by any law from;

27 any particular insurance or surety company, agent, or broker.

28 Sec. 6. (a) Construction services provided pursuant to
 29 design-build contracts are subject to IC 5-16-7. Before the issuance
 30 of a request for proposals to the potential design-builders under
 31 IC 5-28-6, the public agency shall convene a committee under
 32 IC 5-16-7-1 for the purpose of establishing the common
 33 construction wage for the public project. The scale of wages
 34 established by the common construction wage committee shall be
 35 made a part of the request for proposals.

36 (b) A contract negotiated with the successful design-builder
 37 must contain a term mandating the payment of common
 38 construction wages to all construction services workers on the
 39 public project.

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